



DEPARTMENT OF VETERANS AFFAIRS

8320-01

CFR Part 3

RIN 2900-AP84

Extension of the Presumptive Period for Compensation for Gulf War Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this interim final rule to amend its adjudication regulations regarding compensation for disabilities resulting from undiagnosed illnesses suffered by veterans who served in the Persian Gulf War. This amendment is necessary to extend the presumptive period for qualifying chronic disabilities resulting from undiagnosed illnesses that must become manifest to a compensable degree in order that entitlement for compensation be established. The intended effect of this amendment is to provide consistency in VA adjudication policy and preserve certain rights afforded to Persian Gulf War veterans and ensure fairness for current and future Persian Gulf War veterans.

DATES: Effective date: This interim final rule is effective [Insert date of publication in the FEDERAL REGISTER].

Comment date: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by

mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AP84 – Extension of the Presumptive Period for Compensation for Gulf War Veterans.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Stephanie Li, Chief, Regulations Staff (211D), Compensation Service, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. Background

In response to the needs and concerns of veterans who served in the Southwest Asia theater of operations during the Persian Gulf War, Congress enacted the Persian Gulf War Veterans’ Benefits Act, Title I of the Veterans’ Benefits Improvement Act of 1994, Public Law 103–446, which was codified in relevant part at 38 U.S.C. 1117. This law provided authority for the Secretary of Veterans Affairs (Secretary) to compensate eligible Gulf War veterans with a chronic disability resulting from undiagnosed illness.

That illness must have become manifest either during active duty service in the Southwest Asia theater of operations during the Persian Gulf War, or disabling to a degree of ten percent or more during a period determined by the Secretary and prescribed by regulation. The Secretary would determine this period after reviewing any credible medical or scientific evidence, the historical treatment afforded disabilities for which VA had established such periods, and other pertinent circumstances regarding the experiences of veterans of the Persian Gulf War.

To implement 38 U.S.C. 1117, VA published a final rule to add 38 CFR 3.317, which established the framework for VA to pay compensation under the Persian Gulf War Veterans' Benefits Act. See 60 FR 6660-6666, Feb. 3, 1995. As part of that rulemaking, VA established a period of two years after Gulf War service in which VA would presume a medical relationship of an undiagnosed illness to that service. VA determined that there was little or no scientific or medical evidence at that time useful in determining an appropriate presumptive period for undiagnosed illnesses. Therefore, VA primarily based this two-year period on its history of establishing presumptive periods as well as the available facts regarding service in the Southwest Asia theater of operations during the Gulf War.

The lack of medical and scientific evidence about the nature and cause of the illnesses suffered by Gulf War veterans continued, as did the uncertainty of an appropriate presumptive period for undiagnosed illnesses. Accordingly, VA established December 31, 2001, as the date by which an undiagnosed illness must become manifest. See 62 FR 23138, Apr. 29, 1997. In 2001, VA again extended the period to December 31, 2006. See 66 FR 56614, Nov. 9, 2001.

In December 2001, section 202(a) of Public Law 107–103 amended 38 U.S.C. 1117 by revising the term “chronic disability” to include the following (or any combination thereof): (a) an undiagnosed illness; (b) a medically unexplained chronic multisymptom illness (such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome) that is defined by a cluster of signs and symptoms; or (c) any diagnosed illness that the Secretary determines warrants a presumption of service connection. The term “qualifying chronic disability” broadened the scope of those illnesses the Secretary may presume related to service. Under 38 U.S.C. 1117, a chronic disability must still occur during service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of ten percent or more disabling during the prescribed presumptive period following such service. VA amended § 3.317 to reflect these changes. See 68 FR 34539, June 10, 2003.

As required by Public Law 105–368, the National Academy of Sciences (NAS) reviews, evaluates, and summarizes the scientific and medical literature for possible association between service in the Southwest Asia theater of operations and long-term adverse health effects. Following review of such NAS reports, VA determined that the evidence remained inconclusive regarding the time of onset of undiagnosed and other illnesses related to Gulf War service and, in December 2006, VA published an interim final rule to further extend the manifestation period from December 31, 2006, to December 31, 2011. See 71 FR 75669, Dec. 18, 2006. Additionally, on October 13, 2010, Congress enacted section 806 of Public Law 111–275, which directed VA to extend its agreement with NAS created under Section 101 of Public Law 105-368 to review, evaluate, and summarize scientific and medical literature associated with Persian Gulf

War service. Congress has not established an end date for the Gulf War as military operations in the Southwest Asia theater of operations continued, including Operation Iraqi Freedom. See 38 U.S.C. 101(33).

In a report published in 2010 titled *Gulf War and Health, Volume 8: Update of Health Effects of Serving in the Gulf War*, available at <http://nationalacademies.org/hmd/reports/2010/gulf-war-and-health-volume-8-health-effects-of-serving-in-the-gulf-war.aspx> (last viewed Aug. 17, 2016), NAS evaluated the available scientific and medical literature regarding the prevalence of chronic multisymptom illnesses in Gulf War veterans. Consistent with its prior findings, NAS concluded, based on multiple studies, that there is sufficient evidence of an association between deployment to the Gulf War and chronic multisymptom illness. NAS analyzed two follow-up studies that surveyed veterans who served in the Gulf War in 1991 to determine whether the increased prevalence of chronic multisymptom illness persisted several years after such service. One study involved detailed examinations and medical histories of veterans deployed to the Gulf War and non-deployed veterans of the same era. The study found that, 10 years after the 1991 Gulf War, chronic multisymptom illness was nearly twice as prevalent in veterans deployed to the Gulf War than in the non-deployed veterans (28.9 percent compared to 15.8 percent). The study found that the prevalence of chronic multisymptom illness decreased gradually over time, but remained significantly elevated 10 years after service. The other follow-up study involved a 2005 survey of veterans deployed to the 1991 Gulf War and their non-deployed counterparts of that era. That study found that 36.5 percent of the deployed veterans reported experiencing symptoms of chronic multisymptom illness in

2005, compared to 11.7 percent of the non-deployed veterans. While this report is based on self-reports, the results are statistically significant and are consistent with the other follow-up report.

The scientific and medical literature surveyed by NAS in 2010 thus suggested that, while the prevalence of chronic multisymptom illness may decrease over time following deployment to the Gulf War, the prevalence remained significantly elevated among deployed veterans more than a decade after deployment. As military operations in the Southwest Asia theater of operations had not ended and scientific and medical evidence failed to identify the manifestation period for associated illnesses, VA again published a rule amending 38 CFR 3.317(b) to extend the presumptive period from December 31, 2011, to December 31, 2016. See 76 FR 81834, Dec. 29, 2011.

II. Current Research

In a report published earlier this year, NAS continued to conclude that there is sufficient evidence of association between Gulf War deployment and the constellation of chronic symptoms known as Gulf War illness. *Gulf War and Health, Volume 10: Update of Health Effects of Serving in the Gulf War*, available at <http://nationalacademies.org/hmd/Reports/2016/Gulf-War-and-Health-Volume-10.aspx> (last viewed Aug. 17, 2016). At present, there is insufficient basis to identify the point, if any, at which the increased risk of chronic multisymptom illness may abate. NAS has concluded that as of its Volume 10 publication date, there are no reliable or validated biomarkers of exposure or symptoms to substantiate the etiology or mechanisms of the illness. NAS further noted that studies looking for biomarkers of Gulf War illness face

many methodological problems irrespective of the approach or technology used.

Although follow-up studies in the future may provide additional information, there is no medical or scientific basis to support the current deadline for manifestation.

III. Extension of Current Deadline

Currently, military operations in the Southwest Asia theater of operations continue. No end date for the Gulf War has been established by Congress or the President. See 38 U.S.C. 101(33). Because scientific uncertainty remains as to the cause and time of onset of illnesses suffered by Persian Gulf War veterans and current IOM research studies are incomplete, limiting entitlement to benefits payable under 38 U.S.C. 1117 due to the expiration of the presumptive period in 38 CFR 3.317(a)(1)(i) is premature. If extension of the current presumptive period is not implemented, servicemembers whose conditions manifest after December 31, 2016, would be substantially disadvantaged compared to servicemembers whose conditions manifested at an earlier date.

Therefore, VA is extending the presumptive period in 38 CFR 3.317(a)(1)(i) for qualifying chronic disabilities that become manifest to a degree of 10 percent or more through December 31, 2021 (a period of 5 years), to ensure those benefits established by Congress are fairly administered.

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 553(b)(B) and (d)(3) to publish this rule without prior opportunity for public comment and good cause to publish this rule with an immediate effective date.

Absent extension of the sunset date in the current regulation, VA's authority to provide benefits in new claims for qualifying chronic disability in Gulf War veterans will lapse on December 31, 2016. A lapse of such authority would be contrary to the public interest because it would have a significant adverse impact on veterans with such disabilities. To avoid such impact, VA is issuing this rule as an interim final rule, effective upon date of publication. However, VA invites public comments on this interim final rule and will fully consider and address any comments received.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). This interim final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule

that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are: 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on October 7, 2016, for publication.

Dated: October 7, 2016

Jeffrey Martin
Office Program Manager
Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Disability benefits, Pensions, Veterans.

For the reasons set out in the preamble, VA amends 38 CFR part 3 as follows:

PART 3 — ADJUDICATION

Subpart A-Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.317, paragraph (a)(1)(i) is revised to read as follows:

3.317 Compensation for certain disabilities occurring in Persian Gulf veterans.

(a) * * *

(1) * * *

(i) Became manifest either during active military, naval, or air service in the Southwest Asia theater of operations, or to a degree of 10 percent or more not later than December 31, 2021; and

* * * * *

(Authority: 38 U.S.C. 1117, 1118).

[FR Doc. 2016-25017 Filed: 10/14/2016 8:45 am; Publication Date: 10/17/2016]